Supreme Court, U.S.
FILED
SEP 22 1993
OFFICE OF THE CLERK

NO: 92-1966

in the Supreme Court of the United States

OCTOBER TERM, 1992

SCOTT NICHOLAS ERRICO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

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PREFACE

The following references will be used by Petitioner:

(Opp.) - State's Opposition Brief

(Pet.) - Petition for Writ of Certiorari

(R.) - Record on Appeal (Petitioner's Second Trial)

(Supp.) - Pre-trial Motion to Suppress Hearing

(Tr.) - Petitioner's First Trial

REASONS FOR GRANTING THE WRIT

WHETHER THE FLORIDA COURT ERRONEOUSLY CONSTRUED THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT TO ALLOW A STATEMENT UNLAWFULLY OBTAINED FROM PETITIONER IN A FOREIGN JURISDICTION TO BE RELIED ON IN SECURING PETITIONER'S CONVICTION

In an unavailing effort to distinguish Bram v. United States, 168 U.S. 532, 18 S.Ct. 183 (1897) from the instant case, Respondent seeks to frame the issue before the Court as one involving a violation of Miranda.[1] Respondent states:

> ...Bram v. United States deals with a coerced confession, and not a violation of Miranda, and is factually distinguishable from the case at bar.

(Opp. 8). Contrary to Respondent's argument, neither Bram nor the instant

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[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

case involve a claim of a Miranda violation per se. Petitioner has never advanced the argument attributed to him by Respondent that "Miranda must extend worldwide to all foreign jurisdictions." (Opp. 11). Petitioner recognizes that the British Officials conducting the interrogation in this case were not bound by Miranda, although the Officials did mislead Petitioner into believing that the United Kingdom "caution" was the "same as" Miranda. (R:11); (Supp.24).

It is undisputed that Petitioner requested counsel at least thirty-seven (37) times during the course of his two and one-half (2-1/2) day interrogation by British Officials. However, Respondent completely misses the point in this regard. Petitioner's repeated requests for counsel and repeated requests that the interrogation cease, are compelling

evidence demonstrating, not only a Miranda violation (were the interrogation on United States soil by United States law enforcement officials), but that Petitioner's inculpatory statements were not given freely or voluntarily and as such, the interrogation and use of the statements violated the Fifth Amendment. As in Bram, the inculpatory statements were the product of mental duress and coercion. Thus, Petitioner's Fifth Amendment rights were violated when his coerced statement was admitted at trial, over his objection.

Contrary to Respondent's argument, Bram cannot be meaningfully distinguished on a factual basis from the case at bar. Respondent states that "[a]t bar there was no physical or mental coercion which was so clearly present in Bram." (Opp. 11). Respondent's position is in direct

conflict with the record in this case. In fact, the interrogation tactics and mental coercion employed by the British Officials, instanter, were far more odious than those utilized by the foreign officials in Bram.

Sub judice, Petitioner, prior to his arrest, clearly indicated that he had no intention of making any statement to the British Officials. (R:2045-49). From the beginning of the post-arrest interrogation period, Petitioner refused to answer any and all questions and responded to each question asked by the British officials with a specific request for legal counsel. (R:2063-65).

Petitioner verbally requested counsel on approximately thirty-seven (37) separate occasions and made several explicit requests that the interrogations cease. Detective Superintendent of

Scotland Yard, Anthony Lundy, explained to Petitioner that if he were afforded counsel, the consultation would be supervised by a British Official. (R:2067). This statement caused Petitioner a great deal of confusion because he was provided, and he signed, two (2) separate forms throughout the interrogation period which, he believed, entitled him to consult with a lawyer in private. (R:2147-49). In fact, the "forms" Petitioner had signed were virtually useless since, unbeknownst to him, the law entitling him to counsel did not take effect until three (3) months later. (R:2176-77).

Petitioner's confusion heightened and the coercive environment intensified when the Senior British Official, Lundy, told Petitioner that his consultation with a lawyer, if permitted, would be

"supervised." (R:2067). British interrogating official Owen Griffin testified that Petitioner "should [have been] allowed to communicate with . . . [counsel] privately," and that he [Griffin] did not "know what Mr. Lundy was referring to there . . ." (R:2068) [emphasis added].

As the interrogation continued, Petitioner was advised that he could be held incommunicado for ninety-six (96) hours at which time the British officials could apply to the court for additional, successive incommunicado inquiry periods of up to seventy-two (72) hours each. (R:2068-69, 2182-83). Petitioner was never told when he would be permitted to consult a solicitor and/or appear before a magistrate. Thus, Petitioner believed that unless he "confessed," he could be

held incommunicado for an indefinite period of time.

After approximately fifty-five (55) hours of continuous and steadfast resistance to the interrogation, Petitioner succumbed to his inquisitors and made highly inculpatory statements concerning the crimes for which he was indicted in the United States. These statements were admitted in evidence, over objection, at Petitioner's trial and formed the basis for his conviction.

Petitioner's repeated requests for counsel and the intentional confusion created, and psychological coercion imposed, by the British Officials demonstrates a clearly coercive physical and psychological atmosphere. As a result, Petitioner's statements cannot possibly be considered to have been freely, knowingly and voluntarily made.

The Record does not support Respondent's assertion that Petitioner was questioned "regarding British crimes [and] . . . very limited concessions of involvement in criminal activities in the United States were made by Petitioner." (Opp. 11). In fact the opposite is true. At the pre-trial Motion to Suppress hearing, Petitioner's counsel questioned Detective Superintendent of Scotland Yard, Lundy about the motive, intent and purpose of his inquiries of Petitioner regarding United States crimes:

> Q: [By: MR. HIRSCHHORN] When you and Mr. Marzovilla-Errico were discussing plea bargain, you were really talking about the United States situation; weren't you?
>
> A: [By: DETECTIVE SUPERINTENDENT LUNDY] In the main, yes, because I had nothing much from the English end of it at the stage other than the two passports.

(Supp. 213) [emphasis added]. Thus, Lundy admitted that the purpose and focus of Petitioner's interrogation was related to Petitioner's criminal problems in the United States. (Supp. 214). Lundy further admitted that he asked Petitioner to tell him everything in relation to crimes both in the United Kingdom and in the United States to "get everything sorted out." (Supp. 211).

Moreover, Respondent's statement that "very limited concessions of involvement in criminal activities in the United States were made by Petitioner" is clearly incorrect. (Opp. 11). After fifty-five (55) hours of interrogation, Petitioner did make highly damaging statements regarding drug trafficking and murder allegations which can hardly be considered

a "very limited concession."[2] It is clear that this improper evidence played a significant role in the jury's ultimate decision to convict Petitioner.

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . .

Arizona v. Fulminante, 499 U.S. ___, 111 S.Ct. 1246, 1257 (1991) (citations omitted).

In Fulminante, this Court reaffirmed a defendant's right to a new trial as a result of the improper admission of a

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[2] During its deliberations, the jury requested a readback of British Official Griffin's testimony regarding his interview with Petitioner "where Mr. Errico's answer was I don't mind the 25 years. I probably will do 15 but the other thing is kind of final. And/or the answer that ends, quote, but I don't want to fry, unquote and the next question." (R:2787). Over defense objection, this portion of the Record was readback to the jury. (R:2788).

coerced murder confession. Fulminante, 111 S.Ct. at 1261. Here, the Respondent cites Fulminante for the proposition that this Court has applied a harmless error analysis to the admission at trial of a coerced confession. (Opp. 11). However, in the case at bar, as in Fulminante, the erroneous admission at trial of Petitioner's coerced confession was clearly not harmless.

In fact, Petitioner's first trial was declared a mistrial because the jurors had deadlocked at eleven (11) to one (1) in favor of acquittal on all charges. (Tr. Vol. XXI, 3162, 3166). At Petitioner's second trial, which is the subject matter of this Petition, the jury requested a readback of the coerced confession. It is clear that Petitioner's statements to the British officials were very important to the jury and Petitioner's conviction was

secured, in large part, by the highly inculpatory statements made by Petitioner to British Officials. Contrary to Respondent's position, these admissions cannot possibly be deemed harmless error under the circumstances of this case and the earlier trial.

The decision of the Florida District Court of Appeal, Fourth District, is in irreconcilable conflict with this Court's decisions in Bram v. United States, 168 U.S. 532, 18 S.Ct. 183 (1897) and Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489 (1964). Coercion and duress take many forms, some obvious, some subtle. All are invidious and inimicable to the Fifth Amendment. Whether a confession is obtained by a physical beating, Brown v. Mississippi, 297 U.S. 278, 56 S.Ct. 461 (1936), by playing on one's emotions such as fear, Ashcraft v. Tennessee, 322 U.S.

143, 64 S.Ct. 921 (1944), or by utilizing sophisticated psychological "mind" games (as here), the result is the same, it is a coerced confession. Being held incommunicado for days, denied counsel despite repeated requests for same, and not knowing when he would be brought before a judicial officer, in totality Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2044 (1973), created a far more coercive atmosphere for Petitioner than that which existed in Bram.

CONCLUSION

In focusing on Miranda, Respondent has failed to correctly address the issue before the Court. Namely, whether a confession obtained by foreign law enforcement officials in a foreign land through improper influence, duress and coercion may be relied on in a court of law in the State of Florida to secure a

defendant's conviction. The Court below also failed to address that issue.

Petitioner's confession, which was clearly coerced and involuntary, ought not be admitted at a trial in the United States merely because the confession was obtained by foreign officials in a foreign land. The basis for exclusion of this evidence is not to deter improper police conduct by foreign officials (which would certainly be a futile effort on the part of this Court). Rather, the basis for exclusion is that coerced confessions are inherently unreliable. Fulminante, 111 S.Ct. at 1257-58.

Thus, the issue before this Court does not turn on the prophylactic rule set forth in Miranda. Rather, this issue turns on whether a clearly involuntary confession obtained in a foreign jurisdiction may be admitted at trial in a

court of law in the United States under the Fifth Amendment of the United States Constitution.

Bram and other precedent from this Court makes clear that the answer to this question is a resounding and unequivocal "no." It does not matter whether the involuntary confession is obtained by law enforcement officials in Detroit or Dallas, Columbia or Canada, or as here, in the United Kingdom. The rule of law set forth in Bram is that regardless of where an accused's confession is obtained or by whom it is obtained, if it is an involuntary and coerced confession, the Fifth Amendment to the United States Constitution prohibits the admission of the confession in any court of law in the United States.

This Court should grant certiorari jurisdiction to resolve the conflict

between the instant case and this Court's prior precedent. The Court should reaffirm this important principle of Fifth Amendment law, restore Petitioner's constitutional rights, vacate Petitioner's convictions and direct that a new trial be held without the use of the Petitioner's involuntary confession.

Respectfully submitted,

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